NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

May 20, 2004

Division of Dockets Management
Food and Drug Administration
5630 Fishers Lane, Room 1061 (HFA-305)
Rockville, MD 20852

RE: Docket No. 03P-0029: Rulemaking on the Non-Essentiality of Albuterol Metered Dose Inhalers (MDIs)

Dear Sir or Madam:

Enclosed for filing to the above-referenced docket please find a letter from the Natural Resources Defense Council ("NRDC") to EPA Administrator Michael O. Leavitt regarding the non-essentiality of chlorofluorocarbon ("CFC") albuterol metered dose inhalers ("MDIs") and the U.S. 2006 essential-use nomination to the Parties to the Montreal Protocol. Please file the enclosed letter as a comment to the docket on CFC albuterol MDI non-essentiality (docket no. 03P-0029).

Thank you for your attention to this matter.

Sincerely

David Doniger
Senior Attorney and Policy Director
NRDC Climate Center

Enclosure

2003P-0029

C12
00CP

www.nrdc.org

1200 New York Avenue, NW, Suite 400
Washington, DC 20005
TEL 202 289-6868 FAX 202 289-1060

NEW YORK • LOS ANGELES • SAN FRANCISCO

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

May 13, 2004

Michael O. Leavitt
Administrator
Environmental Protection Agency
3000 Ariel Rios Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

By Fax

Re: Depletion of the Stratospheric Ozone Layer

Dear Administrator Leavitt:

The Natural Resources Defense Council ("NRDC") is a national environmental organization with more than 550,000 members dedicated to protecting public health and the Earth's critical natural systems for the benefit of present and future generations. For many years NRDC has fought to protect the stratospheric ozone layer from continuing destruction by ozone-depleting substances. As EPA has long recognized, depletion of the ozone layer results in significant adverse health and environmental effects: *e.g.*, skin cancer, cataracts, increased incidence of respiratory illnesses, ecosystem degradation, etc.

I am writing to express concern regarding several related actions that could delay the final phase-out of chlorofluorocarbons ("CFCs") and exacerbate the destruction of the Earth's protective ozone layer: (1) the inclusion of CFCs for albuterol metered dose inhalers ("MDIs") in the U.S. essential-use authorization nomination for 2006 ("2006 U.S. EUA Nomination"); (2) the existence of excessive stockpiles of CFCs in the United States; and (3) the planned expansion of CFC production by Honeywell in Baton Rouge, Louisiana.

Each of these issues implicates Decisions adopted by the Parties to the Montreal Protocol, including the United States. The requirements of the Montreal Protocol are binding on the United States both because our country is a Party to that treaty, and because of the express terms of the Clean Air Act ("CAA").[1]

---

[1] The CAA states that its Stratospheric Ozone Protection subchapter must be "construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol," and "[i]n the case of conflict between any provision of this subchapter and any provision of the Montreal Protocol, the more stringent provision shall govern."42 U.S.C. § 7671m(b).

1. Inclusion of CFCs For Albuterol MDIs in the 2006 U.S. EUA Nomination

On February 5, 2005, the United States submitted an essential-use nomination to the Montreal Protocol Secretariat, seeking authorization from the Parties of 1900 metric tonnes of CFCs for essential uses in 2006. The U.S. nomination includes 1330 metric tonnes of CFCs for albuterol MDIs – 70 percent of the entire request.[2] As NRDC has previously urged,[3] CFC albuterol MDIs are no longer essential under Montreal Protocol and U.S. law and should be removed from the U.S. market no later than January 1, 2005.

Decision IV/25 of the Parties to the Montreal Protocol provides, *inter alia*, that a use of ozone-depleting substances is essential "only if . . . [t]here are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health."[4] CFC-free albuterol MDIs have been successfully introduced in dozens of countries around the world, including the United States, and have been marketed for more than seven years in the United States alone.[5] This broad level of acceptance in widely varying settings is proof of the technical feasibility of CFC-free alternatives to CFC albuterol MDIs. Also, the ability of Schering-Plough and GlaxoSmithKline to successfully market their respective CFC-free albuterol MDIs at standard retail prices in the United States establishes that these alternatives are economically feasible.

While the CAA assigns EPA and FDA joint responsibility in determining the essentiality of ozone-depleting substance uses as it relates to marketing of goods in the United States,[6] EPA has the final responsibility to authorize the "limited quantities" of ozone-depleting substances for essential uses.[7] EPA must make this determination "consistent with the Montreal Protocol."[8] EPA has incorporated the provisions of Decision IV/25 directly into its regulations[9] and has relied on this distinction to support its refusal to seek essential-use authorizations for non-essential uses under the Protocol in the past, even when FDA had not yet taken action to deem those uses no longer essential under FDA regulations. For example, Decision XII/2 of the Parties generally deemed CFC MDIs

---

2 United States' Nomination of the Aerosol Metered Dose Inhaler (MDI) As An Essential Use at 5 (Feb. 5, 2004) (hereinafter "2006 U.S. EUA Nomination").

3 NRDC letter to FDA Commissioner Mark B. McClellan at 3 (Feb. 9, 2004).

4 United Nations Environmental Program, Report of the 4th Meeting of the Parties at Decision IV/25(a)(ii), UNEP/OzL.Pro.4/15 (Nov. 25, 1992).

5 U.S. Stakeholders Group on MDI Transition, Citizen Petition at 9-10 (January 29, 2003).

6 42 U.S.C. §§ 7671(8) and 7671c(d)(2).

7 42 U.S.C. § 7671c(c) and (d)(2).

8 42 U.S.C. 7671c(d)(2).

9 40 C.F.R. § 82.3 (definition of "Essential-Uses").

approved after December 31, 2000 to be non-essential.[10] In its rule implementing Decision XII/2 under U.S. regulations, EPA determined not to allocate allowances for CFCs for use in MDIs approved by FDA after that date.[11] EPA stated:

> [U]nder section 604(d)(2) [of the CAA], EPA is to authorize production of CFCs for use in medical devices only "to the extent such action is consistent with the Montreal Protocol." If EPA were to continue to allocate essential-use allowances for MDIs that are no longer considered essential, the U.S. would be in violation of the Montreal Protocol.[12]

EPA has relied on the terms of Decision IV/25 to rule out essential-use nominations even where the Parties have not specifically deemed a particular use to be non-essential via a formal Decision (as it did with newly approved CFC MDIs).[13]

Since albuterol MDIs no longer meet the standard for essentiality established by Decision IV/25, EPA should amend its pending nomination for 2006 essential-use authorizations to remove those volumes of CFCs requested for albuterol MDIs. The removal of albuterol MDIs would enable EPA to reduce the U.S. 2006 nomination by 70 percent.

---

10 United Nations Environment Programme, Report of the 12th Meeting of the Parties, at Decision XII/2 para. 2, UNEP/OzL.Pro.12/9 (Jan. 10, 2001).

11 See Protection of Stratospheric Ozone: Allocation of Essential-use Allowances for Calendar Year 2002, 67 Fed. Reg. 6352, 6353 (Feb. 11, 2002) (final rule) (hereinafter "2002 EUA Allocation").

12 Id. at 6354. EPA took this action even though FDA has not determined CFC MDIs approved after December 31, 2000 to be non-essential. In fact, in its final rule on essentiality determinations – issued after Decision XII/2 was adopted by the 12th Meeting of the Parties to the Protocol – FDA specifically declined to do so. Use of Ozone-Depleting Substances; Essential-Use Determinations, 67 Fed. Reg. 48370, 48380 (July 24, 2002) (final rule) (hereinafter "Essentiality Regulation"). Nevertheless, EPA properly does not nominate these post-2000 devices for essential-use CFC volumes under the Protocol.

13 For example, nasal steroid MDIs have never been deemed essential under the Montreal Protocol. See Technology and Economic Assessment Panel ("TEAP) Progress Report, Section 6.1.2, para. 3, pg. 90 (March 1995) (stating the Panel was unable to recommend nasal inhalers as an essential use). Consistent with the Protocol, EPA has never allowed production or importation of CFCs for use in such MDIs as an essential use. See Technology and Economic Assessment Panel ("TEAP") Progress Report, Section 6.1.2, para. 3, pg. 90 (March 1995) (stating the Panel was unable to recommend nasal inhalers as an essential use). See Nominations for Exemptions to the Production and Import Phaseout of Ozone Depleting Substances for Uses Satisfying the Montreal Protocol "Essential Use" Criteria, 60 Fed. Reg. 54349, 54351 (Oct. 23, 1995) (requesting applications for essential-use exemptions and specifying that nominations for MDIs may not include nasal MDIs); 2002 EUA Allocation, 67 Fed. Reg. at 6360 (specifying that essential-use allowances only are allocated for oral inhalation MDIs). However, under FDA regulations, nasal MDIs remained on FDA's essential-use list until entry into effect of FDA's final rule on essentiality determinations in July 2003. See Essentiality Regulation at 48372, 82; 21 C.F.R. § 2.125(e)(1).

2. Excessive U.S. CFC Stockpiles

A second reason to reduce the U.S. 2006 nomination is that Decision IV/25 stipulates that essential uses of a controlled substance may be permitted "only if . . . [t]he controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances . . . ." NRDC has reason to believe that manufacturers of CFC albuterol MDIs have built up CFC stockpiles that are excessive relative to their annual needs. In an April 20, 2004 letter to the public FDA docket on albuterol non-essentiality, Honeywell – the primary manufacturer of CFCs for the U.S. MDI market –stated that U.S. MDI manufacturers' existing reserves, "coupled with essential-use allowances for 2004 and 2005, should allow [the manufacturers] to use Weert-made product until 2008."[14]

In other words, these manufacturers already have sufficient stockpiles and essential-use allowances to provide at least two years' of production after the 2005 closure of Honeywell's production facility in Weert, Netherlands. If individual companies have enough CFCs in stockpiles to last until 2008 then, under the plain terms of Decision IV/25, these companies certainly cannot be allocated essential use volumes for new production for 2006.

Honeywell's statement on the padding of U.S. MDI manufacturers CFC stockpiles through excessive essential-use requests is supported with respect to CFC albuterol manufacturers by past EPA essential-use licensing decisions and the 2006 U.S. EUA Nomination. Albuterol MDIs account for only about 50 percent of U.S. demand for CFCs.[15] Of this 50 percent, 13 percent is attributable to IVAX, which obtains its CFC allocation under the European Community's essential-use authorization.[16] Nonetheless, CFCs for the three U.S. albuterol MDI companies comprise nearly 70 percent of EPA's total 2004 allocation of essential-use licenses.[17] Similarly, 70 percent of the 2006 U.S. EUA nomination is for CFC albuterol companies. This indicates that these companies continue to build huge CFC stockpiles.

This information contradicts the assertion in the 2006 U.S. essential-use authorization nomination that aggregate stockpiles – *i.e.*, for all companies taken together – have been

---

14 Honeywell letter to FDA Docket 03P-0029 at 2 (April 20, 2004) (hereinafter "Honeywell Letter").

15 Technology and Economic Assessment Panel ("TEAP") Progress Report, Section 5.1.4, United States' Nomination, pg. 45 (April 2002).

16 National Economic Research Associates, Inc., "The Impact on Patients and Payers of Designating Albuterol a Non-Essential Use of an Ozone Depleting Substance" at Exhibit 7 (Sept. 8, 2003) (submitted to FDA Docket 03P-0029).

17 Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2004, 69 Fed. Reg. 4059, 4064 (Jan. 28, 2004) (showing that the three CFC albuterol MDI manufacturers were allocated 1444.60 MT of the 2077.91 MT total allocation for 2004, or 69.52%).

at or below a 12-month reserve level.[18] Because sufficient stocks of CFCs exist in the United States for production of CFC albuterol MDIs, the U.S. nomination should not include volumes for such MDIs.

3. Proposed Expansion of CFC Production by Honeywell

A third concern is Honeywell's proposal to start production of CFC-11 and CFC-12 in Baton Rouge. In its April 20, 2004 letter to FDA, Honeywell stated that it plans to consolidate its worldwide CFC production in Baton Rouge subsequent to the 2005 closure of Honeywell's facility in Weert, Netherlands pursuant to an order from the Dutch Government.[19] Honeywell states that it currently manufactures only CFC-114 at its Baton Rouge plant, and that "Baton Rouge production of CFC-11 and CFC-12 was suspended in 1995 . . . ."[20] Honeywell now intends to start anew to produce CFC-11 and CFC-12 in Baton Rouge for pharmaceutical uses, including specifically albuterol MDIs.[21]

As stated above, no rationale exists for continued production of CFCs for albuterol MDIs. CFC albuterol MDIs are not essential under either Montreal Protocol or U.S. law; and even if they were, there already exists excessive stockpiles of CFCs in the United States that can be used for such MDIs.

But even if the foregoing were not the case, Honeywell's proposed expansion of CFC production cannot be permitted. Montreal Protocol Decision VII/9 provides that after December 7, 1995 the United States may not "install or commission any new capacity for the production of" CFCs. The plain intent of the Parties in adopting Decision VII/9 was to limit CFC production by prohibiting any expansion of production capacity at any time after December 7, 1995.

Honeywell does not state what steps it would need to take to begin producing CFC-11 and CFC-12 in Baton Rouge. However, it is quite likely that Honeywell would have to install some new or additional equipment, especially since the production of pharmaceutical-grade CFCs is subject to much tighter standards than CFCs for non-pharmaceutical uses. Decision VII/9 prohibits such installation of new or additional equipment to produce CFCs.

---

18 2006 U.S. EUA Nomination at 14-15. The U.S. nomination fails to comply with Decision XV/25's requirement that essential-use authorization nominations specify the volumes requested on an active-ingredient-by-active-ingredient basis. Whether a CFC stockpile is sufficient or excessive must be determined for each MDI manufacturer and active ingredient.

19 Honeywell Letter at 1-2.

20 Id. at 1.

21 Id. at 2.

Even bringing "mothballed" equipment into service would also be contrary to the terms of Decision VII/9. As noted above, Decision VII/9 provides that Honeywell may not install "or commission" new CFC production capacity. The common definition of "commission" includes to "bring into operation," "commence active service" or "put into active service."[22] Hence, Decision VII/9 also prohibits Honeywell from "bringing into operation" or "placing into active service" previously installed equipment that is not currently used for CFC-11 or CFC-12 production. This includes any equipment that previously was used to produce these substances, but which was decommissioned in 1995. Placing such equipment back into active service plainly would constitute the "commissioning" of production capacity not currently in service (*i.e.*, "new production capacity") and therefore would clearly violate Decision VII/9.

It is equally clear that converting production capacity used for one controlled substance into production capacity for another controlled substance would constitute the installation or commissioning of new capacity for the latter substance. Thus, Decision VII/9 also prohibits Honeywell from converting any of its current CFC-114 production capacity into new CFC-11 or CFC-12 production capacity.

Thus, EPA may not authorize, and Honeywell may not engage in, either (a) installation of new or additional equipment to produce CFCs; (b) re-commissioning of previously decommissioned CFC production equipment; or (c) conversion of equipment previously used to produce one substance (*e.g.*, CFC-114) to produce different substances (*e.g.*, CFC-11 or CFC-12).

4. EPA Actions to Enforce the Clean Air Act

In light of the foregoing, EPA should submit a revised 2006 essential-use nomination to the Protocol Secretariat that reduces the volumes requested by 70 percent to reflect the fact that CFC albuterol MDIs are no longer essential. At the very least, EPA should reduce the U.S. 2006 EUA Nomination to reflect the existence of huge CFC stockpiles held by MDI producers. To the extent necessary to accomplish such measures, EPA should require individual MDI manufacturers to provide a detailed accounting of their existing CFC stockpiles and annual MDI production and sales. EPA should take this action prior to the July 13, 2004 meeting of the Protocol's Open-Ended Working Group, so that the revised U.S. EUA Nomination may be properly presented to the 16th Meeting of the Parties in November.

In addition, EPA should take steps to assure that Honeywell does not start CFC-11 or CFC-12 production at its plant in Baton Rouge, by prohibiting Honeywell from installing new or additional equipment to produce CFCs, re-commissioning previously decommissioned CFC production equipment, or converting equipment previously used to

---

22 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 452 (1993); WEBSTER'S II NEW COLLEGE DICTIONARY 226 (1995).

produce CFC-114 (or any other substance) to produce CFC-11 or CFC-12. EPA should require Honeywell to provide a complete explanation of its activities in Baton Rouge, and ensure that those activities comply with the CAA and Montreal Protocol.

Thank you for your assistance in fulfilling EPA's legal responsibility to protect our planet's fragile ozone shield.

Sincerely,

David Doniger
Policy Director
NRDC Climate Center

cc: Jeffrey R. Holmstead, Assistant Administrator
Environmental Protection Agency

John F. Turner, Assistant Secretary for Oceans and
International Environmental and Scientific Affairs
Department of State

Lester M. Crawford, Acting Commissioner
Food and Drug Administration

James L. Connaughton, Chairman
Council on Environmental Quality

John D. Graham, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Dockets Management Branch (Docket 03P-0029)
Food and Drug Administration